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U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GABRIEL HERNANDEZ-ALVARADO,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 02-72639

Agency No. A77-294-966

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted March 8, 2006^{**}

Before: CANBY, BEEZER and KOZINSKI, Circuit Judges.

Gabriel Hernandez-Alvarado, a native and citizen of Mexico, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order summarily affirming an immigration judge's ("IJ") order denying his untimely application for

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

cancellation of removal. We have jurisdiction under 8 U.S.C. § 1252. We review de novo. *Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 733 (9th Cir. 2004). We grant the petition for review and remand for further proceedings.

Hernandez-Alvarado's application for cancellation of removal was properly deemed abandoned because he did not file an application prior to the deadline imposed by the IJ. *See* 8 C.F.R. § 1003.31(c) (providing the IJ with authority to set filing deadlines). However, the BIA failed to address both Hernandez-Alvarado's claim that ineffective assistance of counsel prevented him from timely filing his application and his request to remand the case to the IJ to allow him to apply for adjustment of status. *See Silva-Calderon v. Ashcroft*, 371 F.3d 1135, 1137 (9th Cir. 2004) (explaining that the BIA should consider all issues in the first instance).

Accordingly, we grant the petition for review and remand with instructions to address in the first instance Hernandez-Alvarado's ineffective assistance of counsel claim and request for remand. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

PETITION FOR REVIEW GRANTED; REMANDED.